

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

IN RE:

MARY EVELYN MOULTON,  
  
Debtor.

CASE NO.: 19-30103-KKS  
CHAPTER: 7

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TDMA, LLC,

ADV. NO.: 19-03011-KKS

Plaintiff,  
  
v.

MARY EVELYN MOULTON,  
  
Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS  
COMPLAINT OBJECTING TO DISCHARGE AND MEMORANDUM  
IN SUPPORT THEREOF (DOC. 9)**

THIS MATTER is before the Court on *Defendant's Motion to Dismiss Complaint Objecting to Discharge and Memorandum in Support Thereof* ("Motion to Dismiss," Doc. 9) and Plaintiff's *Response in Opposition to Motion to Dismiss* ("Response," Doc. 15). After a review of the pleadings and relevant case law, the Motion is due to be granted with leave to amend for the reasons that follow.

## **BACKGROUND**

Plaintiff began this Adversary Proceeding by filing a two-count Complaint.<sup>1</sup> Defendant filed the Motion, which requests dismissal with leave to amend, on the basis that the Complaint does not meet the pleading requirements of Fed. R. Civ. P. 8, made applicable by Fed. R. Bankr. P. 7008, and the Complaint fails to plead fraud with particularity as required under Fed. R. Civ. P. 9(b), made applicable by Fed. R. Bankr. P. 7009.

The crux of Defendant's argument as to Count I is that Plaintiff failed to state a cause of action by not including a timeline for the transfers complained of and not connecting facts to conclusory legal conclusions. Defendant further argues that some of the allegations include transfers of money to Defendant while some of the allegations involved transfers between entities controlled by Defendant to third parties and transfers among third parties. Defendant asserts that none of these types of transfers are contemplated by § 727(a)(2).

As to Count II, Defendant argues that Plaintiff fails to assert false representations or omissions of information that are material. Defendant

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<sup>1</sup> Doc. 1.

further argues that Plaintiff asserts a “myriad of irrelevant allegations” regarding assets of non-debtor entities, the removal of debt from Defendant’s schedules, and failure to disclose information that was later added to amended Schedules and Statement of Financial Affairs.

In the Response, Plaintiff argues that Count I is sufficiently pled under the “Doctrine of Continuing Concealment,” as Defendant diverted the fruits of her labor and initiated loans from the various entities in lieu of a salary in an attempt to hinder, delay, and defraud her creditors. Plaintiff asserts that the transfers listed in the Complaint constitute transfers and/or concealment for purposes of § 727(a)(2). As to Count II, Plaintiff argues that it has alleged multiple inaccuracies in Debtor’s testimony and schedules sufficient to survive the Motion. Plaintiff asserts that Defendant’s omissions and inaccuracies demonstrate a reckless and cavalier attitude toward her duty to disclose, and evidence the level of fraudulent intent required under § 727(a)(4).

## DISCUSSION

### **Count I Fails to State a Cause of Action under 11 U.S.C. § 727(a)(2).**

Plaintiff asks this Court to deny Defendant's discharge in Count I pursuant to 11 U.S.C. § 727(a)(2). A cause of action under § 727(a)(2) arises when

the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition . . .<sup>2</sup>

To be successful in an objection to discharge pursuant to § 727(a)(2)(A),

Plaintiff must establish:

(1) that the act complained of was done within one year prior to the date the petition was filed, (2) with actual intent to hinder, delay, or defraud a creditor, (3) that the act was that of the debtor, and (4) that the act consisted [of] transferring, removing, destroying or concealing any of the debtor's property.<sup>3</sup>

To survive a motion to dismiss generally, a complaint must contain "a short and plain statement of the claim showing the pleader is entitled

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<sup>2</sup> 11 U.S.C. § 727(a)(2) (2019).

<sup>3</sup> *In re Coady*, 588 F.3d 1312, 1315 (11th Cir. 2009)(citing *In re Jennings*, 533 F.3d 1333, 1339 (11th Cir. 2008)).

to relief;”<sup>4</sup> “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.”<sup>5</sup> While Plaintiff is not required at this stage to include detailed factual allegations, there must be “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>6</sup>

From the Complaint, it is not clear if Plaintiff alleges a cause of action under § 727(a)(2)(A) or (B) or both. In paragraph 16, Plaintiff asserts that Defendant’s actions occurred “within one year before the date of the filing of the petition or . . . after the date of the filing of the petition.” Regardless of which subsection Plaintiff is moving under, the basic requirements of the Bankruptcy Code are not met.

Further, Plaintiff contends that Count I is pled under the “Doctrine of Continuing Concealment,” a concept “in which a debtor has kept his assets out of a creditor’s reach during the look-back period [of §

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<sup>4</sup> Fed. R. Civ. P. 8(a)(2), made applicable by Fed. R. Bankr. P. 7008.

<sup>5</sup> *In re Williams*, Case. No.: 18-01002-KKS, 2018 WL 7575597 at \*2 (Bankr. N.D. Fla. Dec. 17, 2018)(citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

<sup>6</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard is met when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

727(a)(2)(A)] by means of a sham ownership arrangement established more than one year before the bankruptcy petition was filed.”<sup>7</sup>

As pled, Count I of the Complaint fails to state a cause of action that is plausible for two fatal reasons: 1) per the basic requirements of the statute, Plaintiff does not allege that the transfers were of property of the debtor (required under § 727(a)(2)(A)), or property of the estate (required under § 727(a)(2)(B)); and 2) for purposes of the “Doctrine of Continuing Concealment,” Plaintiff does not allege that Defendant concealed her assets from creditors through the various entities she purportedly controls. Without these basic factual allegations, Count I cannot survive the Motion and is due to be dismissed. Any further amended complaint must contain at least these factual allegations to give rise to a plausible claim for relief under 11 U.S.C. § 727(a)(2).

### **Count II Contains Improper Shotgun Pleading.**

In Count II, Plaintiff seeks a denial of Defendant’s discharge under 11 U.S.C. § 727(a)(4). Pursuant to § 727(a)(4), a discharge should be denied where: “the debtor knowing and fraudulently, in or in connection with the case – (A) made a false oath or account . . . or (D) withheld . . .

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<sup>7</sup> *In re Coady*, 558 F.3d 1312, 1316 (11th Cir. 2009).

any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs . . .”<sup>8</sup>

When pleading fraud, Fed. R. Civ. P. 9(b) requires a party to “state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.”<sup>9</sup>

The deficiencies Defendant describes in the Motion as to Count II are improper “shotgun pleading” which has been disallowed by the Eleventh Circuit Court of Appeals and this Court. Shotgun pleading occurs when a complaint is drafted in such a way that “it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief.”<sup>10</sup> One type of shotgun pleading occurs where a complaint contains “several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts . . .

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<sup>8</sup> 11 U.S.C. § 727(a)(4) (2019).

<sup>9</sup> Fed. R. Civ. P. 9(b) made applicable by Fed. R. Bankr. P. 7009. The Eleventh Circuit Court of Appeals has found that the particularity requirement of Rule 9(b) may be met when a plaintiff alleges: “(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each statement and the person responsible for making (or, in the case of omissions, not making) [them], and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants “obtained as a consequence of the fraud.” *Brooks v. Blue Cross & Blue Shield of Fla. Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997).

<sup>10</sup> *In re Williams*, Case. No.: 18-01002-KKS, 2018 WL 7575597 at \*3 (Bankr. N.D. Fla. Dec. 17, 2018)(citing *Anderson v. District Bd. of Trustees of Cent. Florida. Community College*, 77 F.3d 364, 366 (11th Cir. 1996)).

contain irrelevant factual allegations and legal conclusions.”<sup>11</sup> Complaints that contain shotgun pleading fail “to give the defendants adequate notice of the claims against them and the ground upon which each claim rests;”<sup>12</sup> and “waste scarce judicial resources, ‘inexorably broaden [ ] the scope of discovery,’ ‘wreak havoc on appellate court dockets,’ and ‘undermine [ ] the public’s respect for the courts.’”<sup>13</sup>

Here, Count II suffers from the defect of shotgun pleading, making it impossible for the Court to determine which factual allegations are applicable to the claim of false oath, or the withholding of information; or to put Defendant on notice as to what grounds Plaintiff alleges her discharge should be denied. As described *supra*, a claim pursuant to 11 U.S.C. § 727(a)(4) arises in situations where there has been a false oath or withholding of information. Plaintiff, in realleging all facts contained in paragraphs 1-99, has included information that is not germane to a determination of denial of discharge under § 727(a)(4), and asks this

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<sup>11</sup> *Williams*, 2018 WL 7575597 at \*3 (citing *Dimieri v. Medicis Pharmaceuticals Corp.*, No. 2:14-CV-176-FTM-38, 2014 WL 6673156 at \*2 (M.D. Fla. Nov. 24, 2014)).

<sup>12</sup> *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294 (11th Cir. 2018)(citing *Weiland v. Palm Beach Cty. Sheriff’s Office*, 792 F.3d 1313, 1320 (11th Cir. 2015)).

<sup>13</sup> *Vibe Micro, Inc.*, 878 F.3d at 1294 (citing *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 981-83 (11th Cir. 2008)).



Court to wade through unnecessary facts to determine which allegations are relevant to this cause of action.

By way of example, paragraphs 14 through 17 describe the elements Plaintiff must allege to seek a denial of discharge under § 727(a)(2) – it is unclear that these allegations are relevant to a determination under § 727(a)(4). Further, paragraphs 22 through 29 allege the roles Defendant plays with various entities “to hinder, delay, and defraud her creditors.” These allegations are specific to a cause of action under § 727(a)(2), as are several other allegations scattered throughout various paragraphs in the Complaint. While it appears that Count II may state a plausible cause of action and may even meet the particularity requirement for pleading fraud, the improper shotgun pleading must be remedied before the Court could make this determination, so Count II is due to be dismissed, with leave for Plaintiff to remedy the shotgun pleading issues in an amended complaint.

For the reasons stated, it is

ORDERED:

1. *Defendant’s Motion to Dismiss Complaint Objecting to Discharge and Memorandum in Support* (Doc. 9) is GRANTED.

2. Plaintiff has twenty-one (21) days from the date of this Order to file an amended complaint consistent with this ruling.

3. The hearing on the Motion, currently scheduled for Tuesday, January 7, 2020 is CANCELED.

DONE and ORDERED on December 31, 2019.



KAREN K. SPECIE  
Chief U.S. Bankruptcy Judge

cc: All interested parties.

Attorney for Defendant is directed to serve a copy of this Order on interested parties and file a certificate of service within three (3) business days of entry of this Order.